136-211

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 3 (Original).

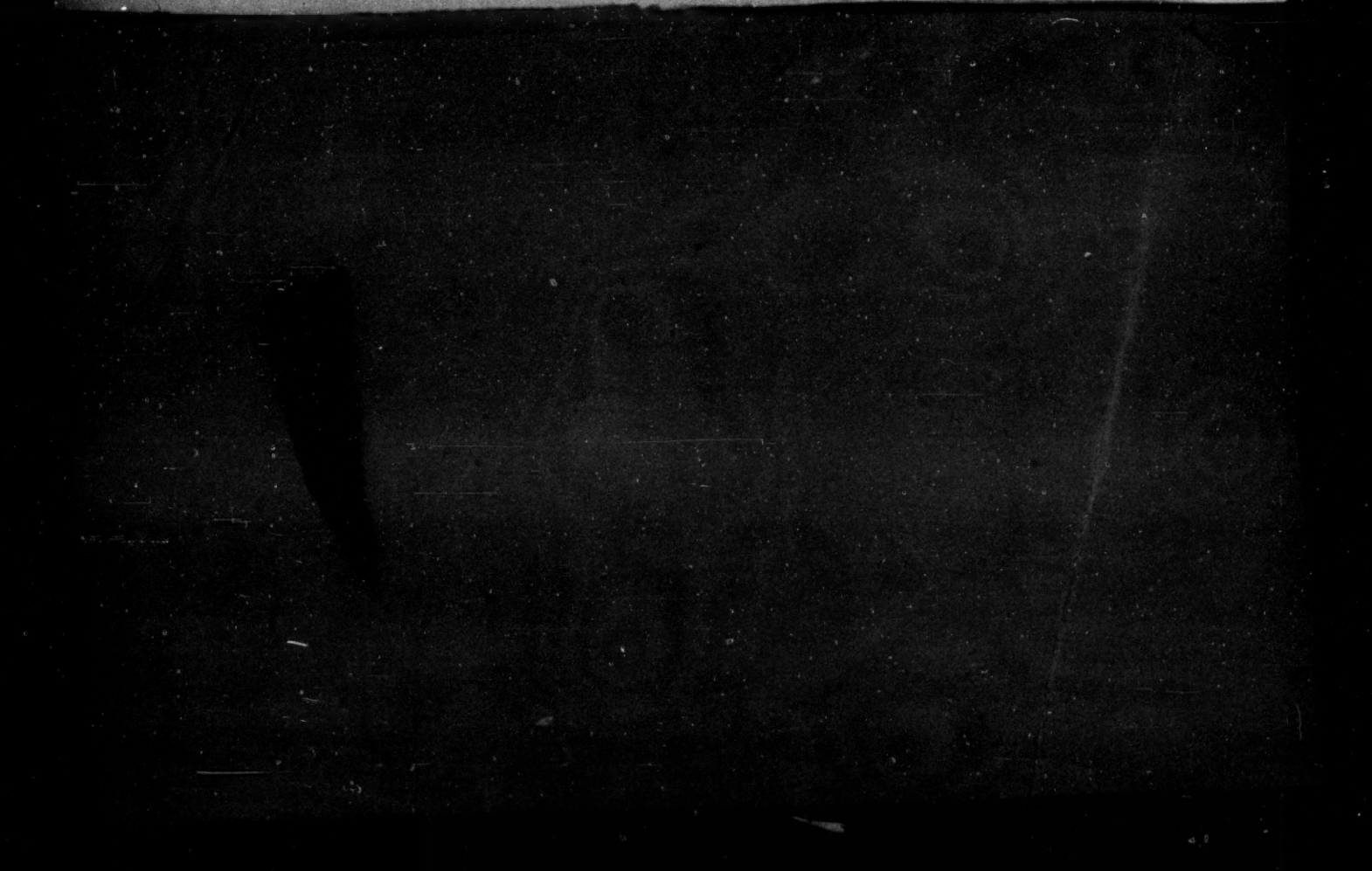
THE UNITED STATES OF AMERICA, PLAINTIFF,

vs.

THE STATE OF NORTH CAROLINA.

AT LAW.

FILED NOVEMBER 5, 1889.



accession 23930

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1 Supreme Court of the United States.—October term, 1889.

At the Capitol of the United States, in the city of Washington and District of Columbia, being the present seat of the national Government of the United States, on the second Monday of October (being the fourteenth day of the same month), in the year of our Lord one thousand eight hundred and eighty-nine, and of the Independence of the United States the one hundred and fourteenth, the Supreme Court of the United States met agreeably to law.

And afterwards, to wit, on the 21st day of October, A. D. 1889, the following entry appears of record, viz:

2 THE UNITED STATES OF AMERICA
vs.
THE STATE OF NORTH CAROLINA.

Mr. F. H. Busbee, of counsel for the United States of America, submitted to the consideration of the court a motion for leave to bring suit in this court against the State of North Carolina upon the cause of action specified in the declaration attached to said motion.

Which said motion is in the words and figures following, viz:

In the Supreme Court of the United States.—October term, 1889.

THE UNITED STATES OF AMERICA
vs.
THE STATE OF NORTH CAROLINA. } No. ——. Original.

Motion.

And now comes the United States, by its Attorney-General, and moves for leave to bring suit in this court against the State of North Carolina upon the cause of action specified in the declaration hereto attached.

W. H. H. MILLER,
Attorney-General.

3 (Endorsed:) Supreme Court U. S., 1889. October term. No. 3. Original. The United States vs. the State of North Carolina. Motion for leave to bring suit against State of North Carolina. Filed Oct. 21, 1889.

And afterwards, to wit, on the 28th day of October, A. D. 1889, the following entry appears of record, viz:

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
THE STATE OF NORTH CAROLINA.

On consideration of the motion for leave to the United States of America to bring a suit in this court against the State of North Carolina, it is now here ordered by the court that said motion be, and the same is hereby, granted.

4 And afterwards, to wit, on the 5th day of November, A. D. 1889, the following entry appears of record, viz:

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
THE STATE OF NORTH CAROLINA.

Mr. S. F. Phillips, of counsel for the plaintiff, by leave of the court, filed the declaration in this cause and submitted to the consideration of the court a motion for a summons to the defendant.

Which said motion is in the words and figures following, viz:

In the Supreme Court of the United States.—October term, 1889.

UNITED STATES OF AMERICA, PL'FF,
vs.
STATE OF NORTH CAROLINA. } No. ——. Original.

5 Now comes the said plaintiff, by Samuel F. Phillips, its special counsel and attorney, and presenting herewith the declaration in the above entitled cause, moves the court here, upon the facts therein stated, for leave to file the same, and to prosecute said action in this honorable court, and further moves the court to issue summons herein.

S. F. PHILLIPS,
Special Counsel and Attorney for Plaintiff.

NOV. 5, 1889.

(Endorsed:) Sup. Court U. S., 1889. Oct'r term. No. 3. Original. The United States, plaintiff, vs. The State of North Carolina. Motion for leave to file declaration and for summons. Filed Nov. 5, 1889.

6 And afterwards, to wit, on the 25th day of November, A. D. 1889, the following entry appears of record, viz:

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
THE STATE OF NORTH CAROLINA. } No. 3. Original.

Ordered by the court, that leave be and the same is hereby granted to file the record as agreed upon by counsel for the respective parties herein.

7 And afterwards, to wit, on the 20th day of December, A. D. 1889, the following entry appears of record, viz:

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
THE STATE OF NORTH CAROLINA. } No. 3. Original.

On motion of Mr. S. F. Phillips, of counsel for the plaintiff, it is ordered by the court that this cause be and the same is hereby assigned for argument on the second Monday in January next after the cases heretofore assigned for that day.

8 And afterwards, to wit, on the 23d day of December, A. D. 1889, the following entry appears of record, viz:

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
THE STATE OF NORTH CAROLINA. } No. 3. Original.

On motion of Mr. Attorney-General Miller it is ordered by the court that this cause be and the same is hereby re-assigned for argument on Monday, January 27, 1890.

And afterwards, to wit, on the 17th day of January, A. D. 1890, the agreed record was filed, which said agreed record is in the words and figures following, viz:

9 In the Supreme Court of the United States.

In the Supreme Court of the United States. October term, 1889.

THE UNITED STATES OF AMERICA
vs.
THE STATE OF NORTH CAROLINA. } No. 3. Original.

DISTRICT OF COLUMBIA,
County of Washington, ss:

The United States of America, the plaintiff in this suit, by William H. H. Miller, its Attorney-General, complains of the State of North Carolina, the defendant herein, which has been summoned to answer the said plaintiff in an action of debt; and thereupon the plaintiff demands of the defendant the sum of $147,000, which it owes to and detains from the said plaintiff.

For that whereas heretofore, to wit, upon the first day of January, A. D. 1854, by its nineteen certain writings obligatory, sealed with its seal and issued under statutes of the State of North Carolina, passed on the 27th of January, 1849, and of the 22d and the 25th of December, 1852, known as coupon bonds, of each of which the following, in all things material, is a true copy, to wit:

It is hereby certified that the State of North Carolina justly owes to the N. C. R. R. Company, or bearer, one thousand dollars, redeem-
10 able in good and lawful money of the United States at the Bank of the Republic, in the city of New York, on the first day of January, 1884, with interest thereon at the rate of six per cent. per annum, payable half-yearly at the said bank on the first days of January and July of each year, from the date of this bond and until the principal be paid, on surrendering the proper coupons hereto annexed.

In witness whereof the governor of the said State, in virtue of the power conferred by law, hath signed this bond and caused the great seal of the State to be hereto affixed, and her public treasurer hath countersigned the same this first day of January, 1854.

(Signed) THS. BRAGG,
Governor.

Countersigned:
D. W. COURTS,
Public Treasurer.

[The Great Seal of the State of North Carolina.]

And whereas also upon the first day of January, 1855, by its seven other certain writings obligatory, known as coupon bonds and issued under the same statutes, sealed with its seal, and of the same tenor as those of which a copy is given above, with the exception that the dates of issue and maturity are, respectively, January the first, 1855, and January the first, 1885, instead of January the first, 1854, and January the first, 1884; and whereas also on the first day of April, 1885, by its one hundred and twenty-one other certain writings obligatory, known as coupon bonds, and issued under a statute of the State of North Carolina, passed upon the 14th day of February, 1855, sealed with its seal, and of
11 the same tenor as those of which a copy is given above, with the exception that the dates of issue and maturity are, respectively, April the first, 1855, and April the first, 1885, instead of January the first, 1854, and January the first, 1884, and also that the interest is payable on the first days of April and October, instead of the first days of January and July in each year—

The defendant acknowledged itself to be held and firmly bound unt[o] the plaintiff as follows, to wit, in the sum of $19,000, redeemable a[t] the Bank of the Republic, in the city of New York, on the first day of January, A. D. 1884, with interest thereon at the rate of 6 per cent. per annum, payable half-yearly at said bank on the first day of January and July of each year from the date of the bonds and until the principal be paid, on surrendering the proper coupon thereto annexed; and also in the sum of $7,000, redeemable at the same bank on the first day of January, 1885, with like interest, payable as above; and also in the sum of $121,000, redeemable at the same bank on the first day of April, 1885, with like interest, payable as above upon the first days of April and October in each year. And whereas the plaintiff, at the several dates when such bonds became due as aforesaid, duly demanded of the defendant payment of the said $147,000, yet the defendant hath not paid the same to the plaintiff, but so to do hath wholly neglected and refused, and still neglects and refuses, to the damage of the plaintiff of $50,000, and thereupon it brings suit.

W. H. H. MILLER,
Attorney-General of the United States.

12 In the Supreme Court of the United States.—October term, 1889.

THE STATE OF NORTH CAROLINA, DEFENDANT,
ats.
THE UNITED STATES OF AMERICA, PLAINTIFF. } No. 3. Original.

And the said defendant, by T. F. Davidson, its attorney-general, says that the plaintiff ought not to have or maintain the action aforesaid against it, because that after the several days in the declaration mentioned as being those upon which the said writings obligatory respectively became due, to wit, upon the 2d day of October, A. D. 1889, the defendant paid to the plaintiff $147,000 as the aggregate principal sum of the writings aforesaid, together with all interest that had accrued thereupon up to the days

at which it had matured due, to wit, at, etc., and this it is ready to verify; wherefore it prays judgment if the plaintiff ought to have or maintain its action, etc.

THEO. F. DAVIDSON,
Attorney-General of North Carolina.

In the Supre ne Court of the United States.—October term, 1889.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
THE STATE OF NORTH CAROLINA, DEFENDANT. } No. 3. Original.

13 And the said plaintiff says that by anything before alleged it ought not to be precluded, etc., because the defendant did not pay to it the said $147,000, etc., etc. And this it prays may be inquired of, etc.

W. H. H. MILLER,
Attorney-General of the United States.

14 In the Supreme Court of the United States.—October term, 1889.

THE STATE OF NORTH CAROLINA, DEFENDANTS,
ats.
THE UNITED STATES OF AMERICA, PLAINTIFF. } No. 3. Original.

And the said defendant does the like, etc.

THEO. F. DAVIDSON,
Attorney-General of North Carolina.

In the Supreme Court of the United States.—October Term, 1889.

THE UNITED STATES OF AMERICA
vs.
THE STATE OF NORTH CAROLINA. } No. 3. Original.

And now comes the United States, by William H. H. Miller, its Attorney-General, and suggesting that upon the face of the writings obligatory in the declaration in the said suit set forth it appears that interest upon the principal money thereof, at the rate of 6 per cent. per annum, to the amount of $41,280, had become due to the plaintiff upon the 2d day of October, 1889, because of the non-payment of such principal from the respective dates at which it had matured due until the day aforesaid; and also that the plea by the defendant so as above pleaded contains no answer to so much of its demand as is included in such $41,280, moves the court for judgment therefor as by *nil dicit.*

W. H. H. MILLER,
Attorney-General of the United States.

15 In the Supreme Court of the United States.—October term, 1889.

THE UNITED STATES OF AMERICA
vs.
THE STATE OF NORTH CAROLINA. } No. 3. Original.

Stipulation.

The parties to the above-entitled case stipulate that upon the issue joined the facts are that payment of the bonds was demanded and refused at the

several times in the years 1884 and 1885 in the declaration alleged; but subsequently, upon or about the 2d day of October, 1889, all coupons upon the bonds were paid, and that, besides, $147,000 was paid upon account of whatever might then remain due upon the bonds, the United States then contending that because of interest at 6 per cent. per annum, which at that time had accrued upon the principal of the bonds since their maturity, such payment left still unpaid upon the debt the sum of $41,280; whilst the State then contended that no interest had accrued upon the principal of the bonds after their maturity, and therefore that such payment was in full of such debt.

The parties submit to the court that, in case as matter of law the principal of said bonds did so bear interest after maturity, judgment is to be entered for the plaintiff for $41,280; but that if it did not so bear interest, judgment is to be entered for the defendant.

W. H. H. MILLER,
Attorney-General of the United States.
THEO. F. DAVIDSON,
Attorney-General of North Carolina.

16 Memorandum of a stipulation between the United States, represented by the Secretary of the Treasury and the Secretary of the Interior, holders and owners of 147,000 coupon bonds of North Carolina for $1,000 each, issued in aid of the North Carolina Railroad Company, of one part, and the State of North Carolina, represented by Daniel G. Fowle, governor, and Donald W. Bain, treasurer, of the other part.

The bonds above mentioned became due as follows:

On the 1st of January, 1884	$19,000
On the 1st of January, 1885	7,000
On the 1st of April, 1885	121,000

The United States demands interest on the principal of said bonds for the time since the principal of said bonds matured, amounting to $41,280 (all figures subject to revision), to which demand the State does not accede.

It is agreed:

(1) That the State shall at once, or as soon as the necessary details for raising the money can be perfected, deliver to the United States $147,000, and thereupon the United States shall transfer the said one hundred and forty-seven bonds to the governor of the State of North Carolina, such transfer, however, to be without prejudice to the claim of the United States to recover said interest.

(2) The question of the liability of the State to pay the interest ($41,280) claimed as having accrued since maturity shall be submitted to the decision of the Supreme Court by suit, in which the United States shall be plaintiff and the State defendant, the latter to accept service of all process and enter an appearance necessary to bring the matter before the said court without any question of jurisdiction being made.

17 (3) Payment of the $41,280 is to be secured at the time the bonds are delivered by a deposit of money or approved securities,

with a depository to be agreed upon between the Secretary of the Treasury and the governor, such payment, of course, to depend upon the decision of the Supreme Court.

WILLIAM WINDOM,
Secretary of the Treasury.
JOHN W. NOBLE,
Secretary of the Interior.
DAN'L G. FOWLE,
Governor.
DONALD W. BAIN,
State Treasurer.

(Endorsed :) Supreme Court U. S., 1889. October term. No. 3. Original. The United States of America, plaintiff, vs. The State of North Carolina. Agreed record. Filed Jan'y 17, 1890.

Office Supreme Court U. S.
FILED.
FEB 11 1890
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1889.

THE UNITED STATES OF AMERICA
vs.
THE STATE OF NORTH CAROLINA. } No. 3. Original.

BRIEF FOR THE PLAINTIFF.

In the Supreme Court of the United States.

OCTOBER TERM, 1889.

THE UNITED STATES OF AMERICA
vs.
THE STATE OF NORTH CAROLINA. } No. 3. Original.

BRIEF FOR THE PLAINTIFF.

The record presents a case in which the United States, being holder of certain thirty-year coupon bonds issued by the State of North Carolina, payable in New York, the principal money of which was $147,000, made due demand for payment at their maturity, which was refused. Several years afterwards the State offered to pay such principal money, but the United States refused to receive it unless interest from its maturity at 6 per cent. were also paid. The State rejected this proposal, but in the end it was stipulated by the parties that the United States should receive such principal without prejudice to a suit which they also agreed should be brought in this court for the interest so claimed.

Accordingly, the present suit has been brought, the

parties thereto stipulating in the course of it "that in case as matter of law the principal of said bonds did so bear interest after maturity judgment is to be entered for the plaintiff for $41,280, but that if it did not so bear interest, judgment is to be entered for the defendant."

The operative part of such bonds (with some variation as to dates of issue and maturity, etc., not important here) was as follows:

> It is hereby certified that the State of North Carolina justly owes to the North Carolina Railroad Company or bearer $1,000, redeemable in good and lawful money of the United States at the Bank of the Republic, in the city of New York, on the 1st day of January, 1884, with interest thereon at the rate of 6 per centum per annum, payable half yearly at the said bank on the first days of January and July of each year from the date of this bond, and until the principal be paid, on surrendering the proper coupons hereto annexed.

The statutes of the State of North Carolina referred to upon the face of the bonds (Record, *Declaration*), so far as material to the present suit, are as follows:

"An act to incorporate the North Carolina Railroad Company" (*Act of* 1848–'49, *ch.* 82; *January* 27, 1849), after setting out details usual in such cases, and authorizing a subscription on behalf of the State for $2,000,000 (20,000 shares) of the proposed stock, payable in installments as the work might progress, provided further:

> SEC. 37. That in case the present legislature shall not provide the necessary and ample means to pay the aforesaid installments on the stock subscribed for

on behalf of the State, as provided for in the thirty-sixth section of this act, and in that event the board of internal improvement aforesaid shall, and they are hereby authorized and empowered to borrow, on the credit of the State, not exceeding $2,000,000, as the same may be needed by the requirements of this act.

SEC. 38. That if in case it shall become necessary to borrow the money by this act authorized, the public treasurer shall issue the necessary certificates, signed by himself and countersigned by the comptroller, in sums not less than one thousand dollars each, pledging the State for the payment of the sum therein mentioned, with interest thereon at a rate not exceeding 6 per cent. per annum, payable semi-annually, at such times and places as the treasurer may appoint—the principal of which certificates shall be redeemable at the end of thirty years from the time the same are issued; but no greater amount of such certificates shall be issued at any one time than may be sufficient to meet the installment required to be paid by the State at that time.

[Sections 39 and 40 provide for the registration of the certificates, and that the treasurer advertise for proposals for their purchase.]

SEC. 41. *Be it further enacted*, That, as security for the redemption of said certificates of debt, the public faith of the State of North Carolina is hereby pledged to the holders thereof, and, in addition thereto, all the stock held by the State in "The North Carolina Railroad Company" hereby created shall be, and the same is hereby, pledged for that purpose; and any dividends of profits which may, from time to time, be declared on the stock held by the State as aforesaid, shall be applied to the payment of the interest

accruing on said certificates, but until such dividends of profits may be declared, it shall be the duty of the treasurer, and he is hereby authorized and directed, to pay all such interest, as the same may accrue, out of any moneys in the treasury not otherwise appropriated.

Act of 1852, chapter 10 (December 22, 1852):

SEC. 2. That all certificates hereafter to be issued for any money to be borrowed for the State by virtue of any act now in force authorizing the same, or of any act which may be hereafter passed for that purpose, shall be signed by the governor and countersigned by the public treasurer, and sealed with the great seal of the State, and shall be made payable to ——— or bearer, and the principal shall be made payable by the State at a day named in the certificate or bond. And coupons of interest in such forms as may be prescribed by the public treasurer, and to be attached to the certificate, and the certificates and coupons attached thereto, shall be made payable at such bank or place in the city of New York as he, the public treasurer, may think proper, or at the office of the public treasury in Raleigh, if preferred by the purchaser: *Provided, however,* That no such certificate shall be issued for a less sum than $1,000, and no certificate shall be sold for a less sum than par value.

Act of 1854–1855, chapter 32 (February 14, 1855):

SEC. 1. That the public treasurer is authorized and instructed to subscribe, in behalf of the State, for ten thousand additional shares of capital stock in the North Carolina Railroad Company, and

that he make payment for said stock, by issuing and making sale of the bonds of the State, under the same provisions, regulations, and restrictions prescribed for the sale of the bonds heretofore issued and sold to pay the State's original subscription in the stock of said company; and the same *pledges* and *securities* are hereby given for the faithful payment and redemption of the certificates of debt now authorized that were given for those issued under the direction of said act: *Provided, nevertheless,* That the whole amount of principal money of such bonds or certificates of debt shall not exceed the sum of $1,000,000.

The parties to this suit have, therefore, assumed that no difficulty in point of *jurisdiction,* constitutional or other, is presented thereby. And the great principles upon which this court proceeded in discussing the case *United States* vs. *Louisiana* (where a State had brought suit in the Court of Claims) appear to justify such assumption. (123 U. S., 32.)

The Constitution of the United States shows plainly that its framers intended to create a government which not only should operate, in fit cases and ordinarily, upon *individuals,* but which also, as between the important political persons which it either recast or created, should be enabled to compose controversies which would be quasi international by a better instrument than either diplomatic discussion or, in the end, war. Indeed, by forbidding to the various political persons contemplated by that instrument the power of making war or treaties with each other, the Constitution became obliged, as it were, by the logic of the situation, to replace what it had taken

away with some other means of satisfaction. For that purpose it created that "*common civil tribunal* for the execution and interpretation of the public law" then about to arise betwixt these new communities, the want of which Kent (vol. 1, p. 2) and other writers make a characteristic deficiency in international law in general. That *pax Americana*, to adapt an old Roman phrase, which prevails here, depends in large measure upon those devices and provisions of the Constitution, by which imperfect international ways and methods are done away with in favor of the "adequate pacific means to secure obedience to the dictates of law" (Kent), summed up and embodied in the Supreme Court and other Federal tribunals.

"The judicial power shall extend * * * to controversies to which the United States shall be a party" (Article 3, section 2.) The only limitation here is that such *controversies* shall, of course, be of a judicial nature; that is, such as ordinarily are cognizable in courts. In all such *controversies* the circumstance that the United States is a party of itself confers jurisdiction. (This, of course, does not exclude statutory regulation in matters of detail.) But, on the other hand, in cases where an *element* of judicial jurisdiction is derived from the fact that *a State is a party* to a controversy, a further element is required therefor, viz, that, besides, *some other State* shall be an adverse party thereto; or *citizens of another State*, or *foreign states, citizens* or *subjects*. The element of jurisdiction where the United States is a party consists in that circumstance alone, the *complete* effect thereof for that purpose, as well as the *incomplete* effect in other cases, as

above, of the circumstances that *a State* is a *party*, being in harmony with obvious general purposes of the Constitution. Unless it can be maintained that the framers of that instrument anticipated that "*controversies* to which the United States shall be a party" could not have as the other party a State, it is plain that the words first above quoted confer jurisdiction upon Federal courts in controversies like the present: a later provision also conferring *original* jurisdiction thereof upon this COURT. Meanwhile, that the United States would naturally become involved in controversies about property and other matters of business with the States in the midst of which it was to live, move, and have its being, must have appeared certain to those men of affairs who framed, as well as to those who adopted the Constitution.

With these preliminary observations we turn to consider the question expressly set forth in the record, viz: Whether a thirty-year bond given by a State for borrowed money, payment of interest upon which prior to its maturity is provided for *totidem verbis* upon its face, carries interest also *after maturity* for such time as payment thereof has been refused, where no provision therein *totidem verbis* for such latter interest has been made.

In stating the question we use the phrase "provision *totidem verbis*" instead of "express provision," because it will be submitted herein, as one part of the case of the plaintiff, that the words used by the State in authorizing an issue of the bonds in question when read in context

with the words of such bonds themselves, do *convey, i. e., express*, a promise to pay interest upon the money which it thus proposed to borrow, until the same shall be repaid.

This point is stated now, because it seems obvious that when it is said, as sometimes it has been, that a State is bound for interest only where it has *expressly* contracted to pay it, all that could have been intended is that a State is so bound only where its language has naturally conveyed that meaning to the other party to the contract. In saying this we do not admit that such variation from its usual dealing may not be inferred otherwise than from language. *Actions may speak louder than words* even in this respect. Payment of interest by a State upon money which it has borrowed and, from temporary financial difficulty, etc., has refused to pay when due, is certainly not *malum prohibitum*, or otherwise *immoral!* Its exemption therefrom is in any case only an exceptional *privilege*, sometimes quite inscrutable, which in point of reason, as one might think, could be waived without causing uneasiness or question upon the part of any who have official or other concern in the interests of justice; and which, therefore, might be held to have been waived by such action or words, accepted and acted upon by other persons, as would generally in business matters have that effect.

The issue of the bonds in question was authorized by the State after a legislative deliberation of four years as to some of them and of six as to others.

The act of 1848–'49 (above), which is the first of the series, authorized a subscription upon behalf of the State for 20,000 shares ($100 each) of stock in a proposed rail-

road company; and, to pay for these, directed money to be borrowed by an issue of *registered bonds*, bearing interest at 6 per cent., and redeemable in thirty years.

Thereupon the act of 1852–'53 (above) provided that the form of the bonds should be changed to *coupon bonds*, payable to bearer, and *at* some bank in the city of New York, or, if any purchaser should prefer, at the State treasury.

The act of 1854–'55 (above) merely authorized 10,000 other such shares to be subscribed for by the State, and provided that they should be paid for as the others had been.

The whole issue of State bonds upon this account was, therefore, $3,000,000, and of these the United States held $147,000; some issued on account of the 20,000 shares, and others on account of the 10,000.

Each of such bonds certified that the State owed to the bearer $1,000, redeemable at the bank of the Republic, in New York City, on a given day thirty years after issue, with interest at 6 per cent., payable half yearly at the same bank, "from the date of the bond until the principal be paid, on surrendering the proper coupons thereto annexed."

It is to be observed that the words "redeemable" and "payable" are used by the State in these statutes and bonds without discriminating between their meanings, but probably attributing to the former the ordinary meaning of the latter. (See *Vermilye* vs. *Express Company*, 21 Wall., 139, 145.)

It is submitted that, in defining the interest to accrue upon the registered bonds authorized by the act of 1848–'49, that statute draws no distinction betwixt *pre-maturity* interest and *post maturity*. It indeed provides in words for interest during the time for which the bonds were to run. But that was necessary in the nature of the case (and not with any view, under the maxim *expressio unius*, etc., of suggesting that no other interest would be payable), inasmuch as borrowed money not yet due does not bear interest unless by express agreement, whereas after it becomes due it bears interest by an inference of law. But the act of 1848–'49, provided that the State should be liable for interest under circumstances in which even an ordinary obligor would not have been so by mere inference of law, is a matter which suggests that the State would also be so liable during those periods in the transaction in which an ordinary obligor would have been so liable.

In *McKinlay* vs. *Blackledge*, 2 Haywood, 28 (A. D. 1797) the short report is as follows:

> *Case*, upon a promissory note to pay at the expiration of seven years from the date, without interest. The seven years elapsed more than two years ago.
>
> *Baker*, for the defendant, contended that the plaintiff ought not to recover interest nor be allowed damages for it, the party having expressly provided that he should not be liable for interest.
>
> *Per curiam*, *Haywood* and *Stone*, judges: This contract was made upon an expectation that it would be performed at the expiration of the seven years, and the words "without interest" are applicable to the seven years; they can not be supposed to extend

> the case of delay of payment until after that time; interest is allowable for the delay of payment after that time. There was a verdict accordingly.

Haywood and Stone did much in early days towards building up whatever reputation the courts of North Carolina have had in the administration of the common law, and their judgment that the denial of pre-maturity interest in a contract has no bearing upon the question of post-maturity interest thereupon is in accordance with our suggestion that a contract giving pre-maturity interest conveys an affirmation that post-maturity interest also will be paid.

Of course it is to be admitted that the liability assumed for pre-maturity interest upon the face of the bonds now in question was so assumed because the situation made it a necessity—*a market necessity*—but this is equally true as regards the liability for interest after maturity. For it is not to be believed that the lenders of the money for which these bonds were given entertained any doubt about the latter liability, or that the borrower did not then know that the lender was transacting under such belief. (*Beckwith* vs. *Trustees*, 29 Conn., 268; 76 Am., Dec., 599.)

To adopt the words in the North Carolina case just quoted:

> The contract was made upon an expectation that it would be performed at the expiration of the thirty years, and the words "with interest," etc., whilst applicable to the thirty years, can not be supposed to exclude the same incident to a delay of payment after that time; nay, more, they affirm it.

The language of the act of 1848–'49 therefore imports a proposed obligation upon the part of the State to pay interest upon the money to be borrowed *up to the time of its repayment.* It authorized the treasurer and other agents of the State to issue *registered* bonds, creating an obligation to that effect. And if the State had found bonds in that form acceptable in the market—as probably it did not—and such had been issued, any question whether they carried interest after maturity would have been a question of interpretation of their words wholly irrespective of a consideration of the supposed privilege of a State in respect to paying interest, that privilege having been waived by North Carolina in *the power of attorney* which it had given, as the above quoted statute of 1848 may be denoted.

The four years which elapsed afterwards down to the act of 1852–'53, appear upon the face of the latter to have shown to the State that the form of the proposed bonds must be changed. The latter act is therefore devoted to changes which concerned the bonds only so far as they were to be *negotiable* (21 Wall., 138); that is, prior to their maturity. Therefore it is to be read as not intending to affect provisions in the preceding statute so far as these were not confined to the period before maturity. Its solicitude as to features that were to concern only this latter period does not argue denial or disparagement of the ordinary obligations attendant upon dishonor of commercial paper in the way that these had been acknowledged in the previous statute.

The scope of the agency created four years before, so

far as this related to any period of possible dishonor of the obligations, remained unchanged.

And by the same reasoning the bonds themselves (framed of course with special view to the amendments of 1852–'53, and which therefore place emphasis upon provisions for the period during which the bonds were to float) are still in other matters to be read by the context afforded by the original act which authorized them.

According to that context the last clause of the bond, which required coupons to be surrendered whenever payments of the interest immediately before provided for should be made, is seen to be a provision *in the interest of the State* only to the extent of requiring, *ex abundanti*, that no installment of interest should be paid unless the negotiable paper (*coupon*), which might be collateral evidence of its being due, were at the same time surrendered, and therefore that this clause was to have no application after the last of such coupons should have been taken up. For any part of the period after the coupons should have been exhausted the simple provisions of the act of 1848–'49 were to govern—*provisions*, that is, which dictated that clause in the bond that exacts "*interest thereon at the rate of 6 per cent, etc., from the date of this bond and until the principal be paid*"—the following clause, *i. e.*, "*on surrendering the proper coupons hereto annexed*," becoming a nullity after the special purposes of the act which authorized them (1852–'53) had been accomplished, and the period for which coupons had been attached had expired.

So far this case has been argued upon special features in the statutes and bonds, conceding thereby to the de-

fendant for argument's sake some things which it seems the law does not allow.

1. *For in the first place it is believed that no case can be found in which a modern and civilized State has successfully claimed that for past-due money borrowed it was by law not bound to pay interest.*

The privilege ordinarily set up is of much more narrow extent than this.

It is known, for instance, that the United States have been very free in claiming exemption from interest (7 Ops. Atty. Gen., 523, etc.). But in a case in which they were adjudged to pay interest upon an account, for nearly a hundred years, this court after consideration defined the privilege asserted on their behalf in the following guarded words: "It has been the general rule of *the officers of the Government* in adjusting and allowing *unliquidated and disputed claims* against the United States to refuse to give interest." (*McKee's Case*, 91 U. S. R., 442, 450.)

It is submitted that after deducting *unliquidated and disputed claims* from those in which this privilege has been at any time vouched on behalf of North Carolina or any other State, the remainder would not be enough to establish *usage* for the purpose in question. Whilst in the absence of proof of usage great enough to amount to a suggestion of acquiescence therein by those who have dealt with them, courts will administer to sovereign suitors in this respect no other justice than that which it also administers to private parties. A plaintiff or defendant State stands before the law upon no more than an equality with the other party.

2. Admitting that questions of interest are questions of local *law* only (*Ohio* v. *Frank*, 103 U. S., 697), and also admitting, as probably the strongest position in this respect on behalf of the State, that the local law here in question may possibly be the common law *of North Carolina*, it is now submitted that there is no authority for the suggestion that that State is exempt from the rule of its own common law, which requires that *whoever knows how much he is indebted and when he is to pay it, shall pay interest.*

That such is the rule of *the common law of North Carolina* ordinarily will probably not be questioned, and is established by a line of cases of which we cite *State* vs. *Blount*, 1 Haywood, 4 (A. D. 1791); *Devereux* vs. *Burgwin*, 11, Iredell, 490 (A. D. 1850); *Lewis* vs. *Rountree*, 79 N. C. Reps., 122 (A. D. 1878); and *Patapsco* vs. *Magee*, 86 N. C., 350 (A. D. 1882). Concurrently since 1786 there has also been *a statute* which provided the like rule in the case of overdue *bonds*, *notes*, and other enumerated instruments. But the courts in the above and other cases have laid down as of common law authority a rule which, beside the contracts enumerated in the act of 1786, includes others, which *Chief-Justice Pearson* sums up (11th, Iredell, above) as follows:

> Our decisions have extended the [English] rule; and for money lent, money paid, or had and received, or due on account stated, the jury ought to be instructed to allow interest, the promise to pay being implied from the nature of the transaction.

He then goes on to distinguish the above cases from those (*trover*, etc.,) in which a jury may *in its discretion* award interest as damages.

So, in *Lewis* vs. *Rountree* (above), *Justice Rodman* says:

> It is a rule that has been gathered from the cases, that wherever a debtor has notice, or ought to know, that he owes a certain sum and when he is to pay, if he fail to pay he ought to pay interest.

And in *Patasco* vs. *Magee* (above) *Justice Ruffin* says: "The rule in this State is that interest, as interest, is allowed only where expressly given by statute, or by the express or implied agreement of the parties;" and thereupon cites the two cases last mentioned.

These are three of the best names in North Carolina jurisprudence.

The rule of common law so laid down by them renders it unnecessary to argue, as perhaps might be done with success, that the statute of 1786 (which also would apply to the present case) includes within its terms all persons, *of whatever dignity*, who borrow money upon bond; and therefore regulates commercial transactions of that sort by the State itself. However, on the other hand, if be a principle of *the common law* in North Carolina that interest is due upon money borrowed when overdue, it seems more clear that the State itself must be subject thereto. For the obvious reason of the rule applies to everybody.

Two cases in the North Carolina courts are nevertheless sometimes cited to the contrary, *Attorney-General* vs. *Cape Fear Co.* (2 Iredell, Equity, 444) and *Bledsoe* vs. *The State* (64 North Carolina, 392).

The former, so far as important here, was a suit for dividends upon stock owned by the State. One defense was, a *set-off* because of interest, on the ground that the

State had not paid its subscription at the proper times. Thereupon the court said:

> The general rule is that the State never pays interest unless she expressly engages to do so. But it does not in this case appear that the money was due, or, consequently, that interest would accrue.

The court then goes on to discuss at length the terms of the subscription, and to draw from these the conclusion last stated. The opinion is that of *Chief-Justice Ruffin*, no doubt, but in view of the case actually before the court, it must be allowed that his mind was not aroused carefully to scrutinize the terms in which the proposition contained in the first sentence above is set out. In the nature of things that was at best a mere otiose and "*nodding*" *admission* of a proposition which the circumstances of the case, as he was just proceeding elaborately to show, rendered of no consequence therein, however defined, inasmuch as the money in question did not appear to have been due before the various times at which it had been paid. The decision, besides, was made in the year 1843, before the State had entered upon the fascinating business of borrowing money, or of manufacturing and selling its own bonds. The rule, therefore, had no reference to the obligations of the State under the latter circumstances.

Besides all this, it is to be observed that the word "*expressly*" at that point at which the above proposition is naturally most indefinite must in all reason, as has already been submitted, include all manners of *expression*, including those which suggest inferences by the special character of the dealings through which the State may

have engaged itself in debt; and at all events not excluding that *expression* which is to be gathered from statutes and bonds like those before the court.

In *Bledsoe's case* (above) the court was administering an exceptional and quasi-paternal jurisdiction (as it had been construed to be) with which a provision of the State constitution had invested it over claims against the State.

The debt there was evidenced by *an account* for fuel furnished during the war to a public institution. The court said:

> It was decided by this court in *Attorney-General* vs. *Cape Fear C.* (2 Ired., Eq., 444), that the State is not bound to pay interest unless there is a special contract to that effect. The contract in this case must be understood to have been made with reference to the law as it then stood.

The court, however, proceeded thereupon to "recommend" to the legislature (the form of action prescribed to it in such cases by the constitution) payment of interest upon the account for several years beginning with the close of the war.

It is submittted that Bledsoe's case, no more than that which it cites, is, under its circumstances, *authority* for the law which it lays down as above. For, if the court was therein executing some anomalous function, as it seemed in that and other like cases to think, its power of declaring *law* was so far in suspense, whilst if it was administering *the law* of North Carolina its view of that law is to be gathered from what it *did*, and not from what it may have *said* in contradiction thereto, its *action* therein having been to render judgment against the State for interest upon an open account!

Neither of these cases go so far either in word or deed as the rule defined in McKee's case above would have allowed, whilst, as we have seen, even that rule does not extend to the present case. In the *Cape Fear case* there was no *overdue* debt, and in *Bledsoe's* no *liquidated* debt. In the former case interest could not have been exacted even from a private debtor, and in the latter it was actually allowed against the State.

3. It seems, however, that the "local law" which defines the right to the interest here in the present case is that of *New York*. *The contract was to be executed, and in view of law was broken, in the latter State.* The rights of the parties therefore in all matters not strictly otherwise defined by their contract were to be ascertained by the law of New York. (Story, *Conflict*, etc., sections 280, etc.; *Andrews* vs. *Pond*, 13 Peters, 65; *Cockle* vs. *Flack*, 93 U. S. R., 344; *Ottawa* vs. *National Bank*, 105 U. S. R.; Am. Dec., 342; *Roberts* vs. *McNeely*, 7 Jones' Law (N. C.), 506; 78 Am. Dec., 261; *Selleck* vs. *French*, 1 Conn., 32; 6 Am. Dec., 185.) This point is mentioned here only as bearing upon the validity of the present contention upon behalf of the State; the *rate* of interest, *ex. gr.*, having been fixed by the provisions of the act of 1848–'49, sec. 38.

For, however it may be as to claims payable at its own treasury, it seems impossible that a State can maintain a contention in a court of justice having jurisdiction over the parties, that with regard to a well-known class of commercial paper liable to interest in general (*People* vs. *New York*, 5 Cowen, 331, etc.; *Lush* vs. *Druse*, 4 Wend., 313; *Miller* vs. *Burroughs*, 4 John Ch., 436), it can venture

into the markets of another State, one center of the money markets of the world, and transact there upon the footing of a privilege which in the nature of things attends it only whilst within that territorial jurisdiction in which it is sovereign. That contention in the present case implies that such privilege attends a State across *two* boundaries, one *physical, i. e.*, of its own *territory*, the other quite as notable, although only *ideal*, that of *commerce*.

In the case of *The United States* vs. *The Bank of the Metropolis* (15 Peters, 377), a ninety-day draft for $4,500 which did not in terms provide for interest, had been drawn virtually *against the United States*, and accepted, but had not been paid when due. Afterwards the United States brought suit upon another transaction against the holders of the draft, and a *set-off* of the amount of such draft including therein interest, was pleaded by the latter. In the court below the set-off had been allowed, and this had resulted in bringing the United States in debt to the defendant. Upon appeal this Court said (p. 392):

> The liability of the United States in the manner it has been stated has been recently declared, in effect, by this court. It said in the case of *The United States* vs. *Dunn* (6 Pet., 51), "the liabilities of parties to a bill of exchange or promissory note has been fixed upon certain principles which are essential to the credit and circulation of such paper." These principles originated in the convenience of commercial transactions, and can not now be departed from. From the daily and unavoidable use of commercial paper by the United States they are as much interested as the community at large in maintaining these principles.

Much less then can the present defendant have both taken upon itself a *commercial character* and also appeared in that guise doing business at a bank *in New York City*, without having become liable thereby to be held to all the duties in that regard of any such dealer and sojourner.

What the local law of the State of New York is upon both of these points, *i. e.*, (1) whether in that State a creditor has a legal right to interest upon ascertained sums of money when overdue, and (2) whether a State is liable for interest in such case, appears by decisions of its court of appeals, as follows:

In *Van Rensellaer* v. *Jewett* (N. Y., 135), in which certain rent reserved in kind, the money value of which was easily to be ascertained, had not been paid when due, Bronson, Judge, laid down the rule of interest in the following words:

> The principle to be extracted from [previous] decisions may be stated as follows: Whenever a debtor is in default for not paying money, delivering property, or rendering services in pursuance of his contract, justice requires that he should indemnify the creditor for the wrong which has been done him; and a just indemnity, though it may sometimes be more, can never be less than the specified amount of money or the value of the property or services at the time they should have been paid or rendered, with interest from the time of default until the obligation was discharged. And if the creditor is obliged to resort to the courts for redress he ought in all such cases to recover interest in addition to the debt, by way of damages. (P. 140.)

2. In *People* vs. *Canal Commissioners* (5 Denio, 401) [a case of mandamus], a question arose whether certain money appraised as damages due from the State, on account of lands condemned for the use of the Erie Canal, bore interest. Thereupon the court said:

> The question now to be considered is, whether the State is bound or liable to pay interest on the amount due, when the mandamus was served. [No evidence had been given of an earlier demand.] The return sets up that neither the canal commissioners nor the commissioners of the canal fund have ever in any case paid interest on any such awards for damages; and it claims that the State is exempt from the payment of interest. The State as such is not liable to pay either principal or interest, as it can not be sued by a citizen, and, of course, can not be compelled to pay any debt. But where questions of public indebtedness come before the judicial tribunals through the agency of public officers over whom the courts have jurisdiction, they do not hesitate to dispose of them upon the same legal and equitable principles which govern judicial decisions as between individuals. They apply the settled rules of law to such cases, and adjudicate upon the payment of both principal and interest in the same manner as in other cases. It is only in such cases that the judicial tribunals can direct the payment of a public debt, and there is no reason why, in directing such payment, the public agents should not be directed to do as ample justice as an individual would be required to do. Hence if the question of the liability of the State to the payment of a claim for damages come properly before a judicial tribunal, whether so brought up by the proper officer or the other party, the tribunal in adjudicating upon the question will, if it

> determines the claim against the State to be just, in addition to directing its payment, also direct the payment of interest thereon where it would in other cases direct such interest to be paid [citing Comm'rs against Kempshall (26 Wend., 404), as deciding the same point]. Thus in a case in Pennsylvania, *Respublica* vs. *Mitchell* (2 Dallas, 101), which related to a settlement of accounts with the comptroller-general, the court resolved that the State was liable to pay interest as well as individuals. So interest was held to be payable upon Treasury notes after due. Indeed, there can be no reason why the State refusing or unable to pay a just debt, should not pay interest thereon in the same way as individuals.

Such is the law of the place at which the State of North Carolina elected to make its bonds payable.

In conclusion, liability of Government to suit in court, however exceptional, may be seen, in the above cases of *The Bank of the Metropolis*, *The Canal Commissioners* (and perhaps hereafter in the present case as well), to have been of great service in bringing the eye and the *metwand* of justice to bear upon pretensions which may have long flourished merely because of the absence of such amenability. The pigeon-holes of executive departments, even in free governments, may become clogged with cobwebs. It is to be doubted whether but for the *accidents* in the cases in Peters and Denio it would not still be held for law (unless some beneficent financial calamity arising from the contrary practice, or an intervention by the legislature, had established a contrary doctrine), that the United States and the State of New York, as well as other States, never pay interest upon their debts. That the de-

cisions to the contrary have been of great pecuniary advantage to these defendants in the interval since 1841 seems most certain. There is nothing to forbid like effect to similar decisions against any State. The principles underlying fair commercial dealing are in the interest of all persons, private or public, natural or artificial. They are in the interest of North Carolina.

We hope that it will not be forgotten that the argument here upon behalf of the United States suggests that the State of North Carolina has always purposed to pay this interest; and that the present contention is probably meant rather to secure a *voucher* for gentlemen who are called upon officially to pay out public money in a case where a good deal might perhaps be said upon both sides, especially hereafter upon the hustings, if the debt had been paid without such voucher. Their claim to a voucher is not to be denied.

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Office Supreme Court U. S.
FILED
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CLERK.

IN THE SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1889.

THE UNITED STATES OF AMERICA,

vs.

THE STATE OF NORTH CAROLINA.

BRIEF FOR THE DEFENDANT.

In the Supreme Court of the United States,

OCTOBER TERM, 1889.

THE UNITED STATES OF AMERICA
vs.
THE STATE OF NORTH CAROLINA.

This case presents the single question: Is the State of North Carolina liable on contract or as damages as claimed on certain paper-writings, declared to be bonds of said State, of one of which the following is a copy?

"It is hereby certified that the State of North Carolina justly owes the North Carolina Railroad Company or bearer $1,000, redeemable in good and lawful money of the United States at the Bank of the Republic, in the city of New York, on the first day of January, 1884, with interest thereon at the rate of six *per centum* per annum, payable half yearly at said bank on the first days of January and July of each year from the date of this bond, and until the principal be paid, on surrendering the proper coupons hereto annexed."

....., [SEAL.]

COUNTERSIGNED: *Governor.*

.....,

Public Treasurer.

The authority for the execution of these paper-writings rests upon certain acts of the Legislature of North Carolina, the first of which was passed at the session of 1848–'49, and is Chapter 82, Public Laws thereof, and entitled as follows:

"AN ACT to incorporate the North Carolina Railroad Company." The sections which are material to the present controversy are as follows:

SEC. 36. That whenever it shall appear to the Board of Internal Improvements of this State, by a certificate, under the seal of said company, signed by their Treasurer and countersigned by their President, that one-third have been subscribed for and taken, and that at least five hundred thousand dollars of said stock has been actually paid into the hands of said Treasurer of said company, the said Board of Internal Improvements shall be and they are hereby authorized and required to subscribe on behalf of the State, for stock in said company to the amount of two millions of dollars to the capital stock of said company; and the subscription shall be paid in the following manner, to-wit: The one-fourth part as soon as the said company shall commence work, and one-fourth every six months thereafter, until the whole subscription on behalf of the State shall be paid: *Provided*, The Treasurer and President of said company shall, before they receive the aforesaid installments, satisfactorily assure the Board of Internal Improvements, by their certificates, under the seal of the said company, that an amount of the private subscription in equal proportion to the stock subscribed by the State.

SEC. 38. That if in case it shall become necessary to borrow the money, by this act authorized, the Public Treasurer shall issue the necessary certificates, signed by himself and countersigned by the Comptroller, in sums not less than one thousand dollars each, pledging the State for the sum therein mentioned, with interest thereon at the rate of interest not exceeding six per cent. per annum, payable semi-annually, at such times and places as the Treasurer may appoint, the principal of which certificates shall be redeemable at the end of thirty years from the time the same are issued. * * * *

SEC. 39. *Be it further enacted*, That the Comptroller shall register the said certificates at large in a book to be by him kept for that purpose, at the time he countersigns the same.

* * * * * * * * * * *

SEC. 42. *Be it further enacted*, That the certificates of debt hereby authorized to be issued, shall be transferable by the holders thereof, their agents or attorneys, properly constituted, in a book to be kept by the Public Treasurer for that purpose; and in every instance, where a transfer is made, the outstanding certificate shall be surrendered and given up to the Public Treasurer, and by him cancelled, and a new one, for the same amount, issued in its place to the person to whom the same is transferred.

The second of which is Chapter 9 of the Laws of North Carolina, 1852, and is as follows:

"An Act to increase the revenue of the State in the sale of "its bonds.

"SECTION 1. *Be it enacted by the General Assembly of "North Carolina, and it is hereby enacted by the authority of "the same*, That it shall be the duty of the Public Treasurer "to have coupons attached to all the bonds of the State here- "after sold by him, and when said bonds are offered for sale "he shall state in the advertisement thereof that said bonds "have coupons attached thereto.

"SEC. 2. *Be it further enacted*, That this act shall be in force "from and after its ratification.

"Ratified 27th December, A. D. 1852."

Acts of 1852, Chapter 10:

"An Act to regulate the form of bonds issued by the State," the material facts of which are as follows:

SECTION 1. *Be it enacted by the General Assembly of the State of North Carolina, and it is hereby enacted by the authority of the same*, That all certificates hereafter to be issued for any money to be borrowed for the State by virtue of any act now in force authorizing the same, or of any act which may be hereafter passed for that purpose, shall be signed by the Governor and countersigned by the Public Treasurer, and sealed with the Great Seal of the State, and shall be made payable to —— or bearer, and the principal

shall be made payable by the State at a day named in the certificate or bond, and coupons of interest in such form as may be prescribed by the Public Treasurer, and to be attached to the certificate, and the certificates and coupons attached thereto shall be made payable at such bank or place in the city of New York as he, the Public Treasurer, may think proper, or at the office of the Public Treasury at Raleigh, if preferred by the purchaser: *Provided*, however, that no such certificate shall be issued for a less sum than one thousand dollars and no certificate shall be sold for a less sum than par value.

SEC. 2. *Be it further enacted*, That it shall be the duty of the Public Treasurer to enter in a book to be kept for that purpose a memorandum of such bond or certificate issued by virtue of this act, the numbers, date of issue, when and where payable, to whom issued, or to whom sold, and at what premium, if any, the same was sold by him.

Ratified December 22d, 1852.

Public Laws 1854–'55, Chapter 32, the material parts of which are as follows:

"An Act for the completion of the North Carolina Railroad."

SECTION 1. *Be it enacted by the General Assembly of North Carolina, and it is hereby enacted by authority of the same*, That the Public Treasurer is authorized and instructed to subscribe in behalf of the State for ten thousand additional shares of capital stock in the North Carolina Railroad Company, and that he make payment for said stock by issuing and making sale of the bonds of the State, under the same provisions, regulations and restrictions prescribed for the sale of the bonds heretofore issued and sold to pay the State's original subscription in the stock of said company, and the same pledges and securities are hereby given for the faithful payment and redemption of the certificates of debt now authorized that were given for those issued under direction of said act. * * * * * * * *

SEC. 2. *Be it further enacted*, That the stock thus directed to be subscribed and paid for in behalf of the State shall be a preferred stock in the North Carolina Railroad Company, and the stock shall be entitled to six per cent. per annum, payable semi-annually thereon, out of any dividends of profits made by said company, before any dividends shall be paid on any other stock in the same; and that the stockholders of said company, in general meeting assembled, shall give their assent to the provisions of this act; and that the President of said company shall make a certificate of said assent, under the seal of the said company, to be approved by the Governor of the State, and filed in the office of the Public Treasurer, before the subscription shall be made as directed in the first section of this act: *Provided*, That the said stock of one million dollars shall continue to be preferred stock, entitled as aforesaid, only so long as and during the time that it is held by the State. * * * * * * *

These Acts constitute the sole authority for the issuance of said paper-writings in manner and form as issued.

It will be remembered that the subscription of the State of North Carolina for the construction of the said North Carolina Railroad was $3,000,000; of which sum $2,000,000 in bonds is claimed, under the first three of the Acts above enumerated, to-wit: The Acts of 1848–'9, ch. 82; the Acts of 1852, chs. 9 and 10, and the remainder, to-wit, the sum of $1,000,000, under the Act of 1854–'5, ch. 32.

The plaintiff's contention is that the defendant is liable on the following grounds:

1. Because of the express agreement contained in the contract to pay interest after maturity.
2. Because the amounts are liquidated and undisputed.
3. Because the "bonds" are solvable in New York.
4. Because they are "commercial paper."
5. Because the State, like an individual, is liable for post maturity interest.

The defendant replies to the first proposition:

That there is no "express" agreement in the "bond" to pay post maturity interest, for the words of the "bond" are "to pay interest on the principal so long as the same shall remain unpaid, *on presentation of the coupons hereto annexed*"; and also to pay the principal at the expiration of thirty years.

The words *express agreement* do not mean, nor could they have been intended to mean, anything but in plain, clear and unequivocal terms.

Unless the contract was *express* to pay post maturity interest the defendant is not liable. The Attorney-General *vs.* The Cape Fear Navigation Company, 2 Ired. Eq. (N. C.), p. 444; Bledsoe *vs.* The State, 64 N. C., 392.

In the case 2 Ired. it was claimed that the State was liable to the company for the reason that she had failed to pay for certain stock.

In the case in 64 N. C. the plaintiff's claim was for supplies furnished by him to the defendant under contract as to price, etc., and that he was entitled to recover interest for the State's failure to perform its contract. In each of the cases the question of the State's liability for interest was involved; and in each a decision on the general interest Act of 1786 was necessary and was made. And in both the Court held that the State was not liable for interest unless by "express agreement."

In the construction of an Act of the Legislature: "It is likewise a general rule in the interpretation of statutes limiting rights and interests, not to construe them to embrace the sovereign power or government, unless the same be expressly named therein, or intended by necessary implication." 96 American Decisions, 403; Kent's Com., Vol. I, 460, 4th Ed.

As stated, in the Attorney General *vs.* Navigation Company and Bledsoe *vs.* The State, *supra*, a construction was given to the Act of 1786.

"In construing the statutes of a State the Federal Courts

"will adopt the settled construction of the State Courts." Elmendorf *vs.* Taylor, 10 Wheat., 152; Shelby *vs.* Gay, 11 Wheat., 361; Bell *vs.* Morrison, 1 Pet., 351–476; 3 Pet., 270; McCutchen *vs.* Marshall, 8 Pet., 220. Where State Courts have varied, last decision adopted. Leffingwell *vs.* Warren, 2 Black., 599. And such adoption will follow, even though U. S. Supreme Court had decided adversely before. Carroll Co., Supervisors, *vs.* United States, 18 Wal., 71; Christy *vs.* Pridgeon, 4 Wal., 196; Post *vs.* Kendall Co., Supervisors, 105 U. S., 667; Henderson *vs.* Griffin, 5 Pet., 151; Potter's Dwarris on Statutes (1874), p. 145, Rule 1; Burgess *vs.* Seligman, 107 U. S., 20, *in loco* 33–34–35; Jaffray *vs.* McGehee, 107 U. S., 361; Roth *vs.* Eliman, 107 U. S., 319.

As to second contention of plaintiff, viz., the State's liability where amounts liquidated and undisputed.

As above appears in Attorney General *vs.* Navigation Co. and Bledsoe *vs.* The State the amounts were liquidated and undisputed.

On this point, see further, page of defendant's brief.

As to the third contention: "The bonds are payable in New York," and the New York authorities are to the effect that the State is liable.

The defendant says:

(1). That from the terms of the paper it is manifest that payment was to be made in New York simply *as a matter of convenience* (Daniel on Negotiable Instruments, §1497), and not for the purpose of rendering the "bonds" subject to the New York law, and this the plaintiff virtually admits when it claims interest on special or express contract.

This is further manifest by the fact that if any interest be recoverable after maturity the plaintiff claims six per cent., and the "bond" reads "*six per cent. until the principal be paid.*" Now, it is admitted that the rate of interest in New York was, at the time of the maturity of the paper, *seven per cent.*

"If the terms of the contract be doubtful, where the State "is a party specially, then the contract shall be construed in "consonance with the common law." Wait's Actions and Defenses, Vol. II, p. 286; Hooper *vs.* Mayor, etc., of Baltimore, 12 Md., 464; Keeley *vs.* Baltimore & Wabash R. R. Co., 17 Md., 82.

"Interest is a creature of statute and is not recoverable un- "der the common law." 83 American Decisions, 244.

Upon a contract for the payment of money and for interest thereon by installments, but which is silent as to interest after the time specified for the payment of the principal, the creditor is entitled to interest after that time by operation of law, and not by any provision of the contract. Re Bartenbach, 11 Banker Reg., 61; Lash *vs.* Lambert, 15 Minn., 416; 2 American Rep., 142; Cooke *vs.* Fowler, L. R., 7 H. L., 27; 9 Eng., 117.

The rule of law that the place of payment fixes the rate of interest operates where no interest or the rate of interest where payable is stated in the contract, and where the rights of the parties enabled them to enter into such a contract.

An instrument is called negotiable when the legal title to the instrument itself and to the whole amount of money expressed on its face may be transferred from one to another by indorsement and delivery by the holder or by delivery only. Daniel on Neg. In., §1. It is a circulating credit like the currency of the country. *Ibid.*, p. 2. It has fitly been termed "a courier without luggage." *Ibid.*, p. 2.

Hence paper non-negotiable, for under the Act of 1848–'9, Sec. 42, to effectuate a transfer, old certificate must be surrendered and a new one issued.

4th contention—"Because they are commercial paper."

"State bonds are not commercial paper, consequently the principles which apply to commercial paper do not apply to them." Randolph on Commercial Paper, Vol. I, p. 1 and §12.

If the paper be sealed, although it have every other quality of commercial paper, it is not commercial paper, which must

be open, unsealed. Daniel on Neg. Instruments, Vol. I, §31. The case of vs. Metropolitan Bank, cited by plaintiff, does not militate against this view, for in that case it was held—the United States being a plaintiff—the defendants under might set up an equitable counter-claim.

In addition, Section 42, Acts of 1848–'9, *supra*, provides: "That the certificates of debt hereby authorized to be issued "shall be transferable by the holders thereof, their agents or "attorneys, properly constituted, in a book to be kept by the "Public Treasurer for that purpose; and in every instance "where a transfer is made, the outstanding certificate shall be "surrendered and given up to the Public Treasurer, and by "him canceled, and a new one, for the same amount, issued in "its place to the person to whom the same is transferred."

The provisions of this section have not been repealed. They are still operative.

The Act of 1852, *supra*, only changes the certificates or bonds into coupon bonds, and makes them payable to bearer. The legislative authority to issue bonds implies authority to issue coupons attached to them for interest. Daniel on Neg. Ins., §1489; hence the change is merely a change in name and not in substance.

Where a contract is made under and by virtue of more than one statute all the statutes must be construed together. Kent's Com., Vol. I, 463, 4th Ed., and cases cited; Potter's Dwarris on Statutes (1874), 699.

"The public can act only through its authorized agents, "and it is not bound until all who are to participate in what "is to be done have performed their respective duties. * * "Negotiable paper is no more protected against this inquiry "than any other." Anthony *vs.* County of Jasper, 101 U. S., 693, approved in Coler *vs.* Cleburne, 131 U. S., 162; Randolph on Commercial Paper, §§348 and 350.

The Act of 1848–'9 constitutes a contract, which was entered into between the State and the individual subscribers

to the stock of the N. C. R. R. Co. Under this Act no bonds of a commercial character could be issued. If the Act of 1852 authorizes the issue it is unconstitutional, for "no State can impair the obligation of contracts." The materiality of this inhibition in the present controversy may be seen in the fact of the plaintiff's claim on "commercial paper" grounds of $42,800. Section of the Act of 1848–'9 provides that the dividends of the individual stockholders shall be in abeyance until, etc.

As stated, $1,000,000 of said subscription has for authority the Act of 1854–'5. By an examination of this Act we find its title to read:

"An Act for the completion of the North Carolina Railroad," and also in Section 1 thereof "that the Public Treasurer is authorized and instructed to subscribe in behalf of the State for ten thousand additional shares of capital stock in the North Carolina Railroad Company * * * * * * and the same pledges and securities are hereby given for the faithful payment and redemption of the certificates now authorized that were given for those issued under direction of said Act."

There are only two Acts—1848–'9 and 1854–'5—that may be specifically designated *as North Carolina Railroad Acts.* As before stated, under the former law a transfer of the bonds, a surrender of the old certificate was required, and a new one issued.

"The passenger is not without luggage" in this requirement.

Besides, "The same pledges and securities" are given under the Act of 1854–'55 as were given under said Act—the Act of 1848–'49. (These pledges and securities have been already adverted to).

Unless, therefore, the bonds or certificates claimed to have been issued under the Act of 1854–'55 were *pledged and secured* as "those issued under direction of said Act"—mean-

ing, of course, the Act of 1848–'49—for they are *in pari materia*, and must be construed together—Kent's Com., Vol. I, 4th Ed.; Rex *vs.* Laxdall *et al.*, 463; *vs.* Patterson, 1 Burr., 445; Dwarris on Statutes, 699—then the bonds as claimed are void (see Coler *vs.* Cleburne, *supra*, and cases cited), and consequently *no* interest, post maturity or otherwise, is recoverable against the defendant.

The Act of 1848–'49, Section 38, directs that the certificates be signed by the Treasurer and countersigned by the Comptroller. Certificates—on which post maturity interest is claimed—were signed by the Governor and countersigned by the Treasurer. Under Coler *vs.* Cleburne they are void. When the bonds were primarily sold they were sold under the laws of North Carolina; consequently the purchaser then took, and all purchasers since have taken, the bonds with Attorney General *vs.* Navigation Co. and Bledsoe *vs.* The State in the contract.

Hence the defendant says: That at all events the interest claimed cannot be recovered on the bonds issued by virtue of the Act of 1854–'55, and this view is strengthened further by the provision Act of 1848–'49, Sec. 38, * * * "pledging the State for the sum therein mentioned, with interest thereon at the rate of interest not exceeding six per cent. per annum, payable semi-annually, at such times and places as the Treasurer may appoint, the principal of which certificates shall be redeemable at the end of thirty years from the time the same are issued."

Here *the interest* before maturity alone is payable "as the Treasurer may appoint." The bonds are coupon bonds. By the coupons the Treasurer has appointed *when and where* the interest is payable.

Under this Act, and as we contend, the Treasurer had no authority to appoint *the place of payment of the bonds* and certainly none to pay post maturity interest! (And this we say holds especially good as to the 1854–'5 bonds). Conse-

quently where no place is designated for payment the note is payable where the maker resides. Daniel on Negotiable Instruments, §90.

We deem it unnecessary more specifically to make answer to plaintiff's fourth contention.

The State of North Carolina is a sovereign. Judge Cooley, in his book on Constitutional Limitations, on page 2, says: In American Constitutional Law, however, there is a division of the powers of sovereignty between the national and State governments by subjects; the formor being possessed of supreme, absolute and uncontrollable power over certain subjects throughout all the States and Territories, while the latter have the like complete power, within their respective territorial limits, over other subjects. And to the same purpose speaks Chancellor Kent, in Vol. I, p. 445, 4th Ed., when he says: The vast field of the law of property, the very extensive head of equity jurisdiction, and the principal rights and duties, which flow from our domestic relations, fall within the control, and we might almost say the exclusive cognizance, of the State governments. We look essentially to the State Courts for protection to all these momentous interests.

For answer to what may be termed the last paragraph of plaintiff's brief, in support of which no authority is cited, it seems hardly necessary for the State to declare that its conduct in this behalf is not for the purpose of obtaining *a voucher*, "but truly for the reasons therein set forth."

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